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IN THE

Supreme Court of the United States

October Term, 1958.

No. 650

ARNOLD HANKINSON,

Petitioner,

v.

HON. FRANCIS L. VAN DUSEN

and

HON. C. WILLIAM KRAFT, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Arnold Hankinson, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered on October 21, 1958.

OPINIONS BELOW.

No opinion was filed by the United States District Court for the Eastern District of Pennsylvania. A memorandum and order were filed October 9, 1958. No opinion was filed by the United States Court of Appeals for the Third Circuit on the order denying the petition for a writ of mandamus and/or prohibition.

JURISDICTION.

The order of the United States Court of Appeals for the Third Circuit was entered on October 21, 1958. The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where, in a personal injury case, the medical issues are admittedly simple and sharply defined, and the case is neither special nor complicated, is not the appointment by the court after those simple issues have been defined, of "impartial" medical witnesses to testify at trial, an unwarranted invasion of the unobstructed right to trial by jury as guaranteed by the Seventh Amendment of the Constitution of the United States?

2. Did the District Court have the power to promulgate the local rule under which such appointment was made?

3. Where a local rule and order command a protesting litigant to undergo medical examinations by court appointed "impartial" medical experts on motion of his opponent, and to pay one-half of the medical fees for such examinations, is not such requirement a deprivation of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States?

4. Where a Federal Rule of Civil Procedure grants to a litigant an absolute and unqualified right, may the District Court purporting to act under such rule by its order condition such absolute right?

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED.

1. Constitution of the United States, Amendment V:

"* * * nor shall any person . . . be deprived of . . . property, without due process of law . . ."

Constitution of the United States, Amendment VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. Federal Rules of Civil Procedure:

"RULE 35.

PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

(a) *Order for Examination.* In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of Findings.*

(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions.

After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition."

"RULE 37.

REFUSAL TO MAKE DISCOVERY: CONSEQUENCES.

* * *

(b) *Failure to Comply With Order.*

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it

to be done, or to permit entry upon land or other property, or on order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination."

* * *

"RULE 53.

MASTERS.

(a) *Appointment and Compensation.* Each district court with the concurrence of a majority of all the

judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

* * *

"RULE 83.

RULES BY DISTRICT COURTS.

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

3. Local Rule of the United States District Court for the Eastern District of Pennsylvania:

"RULE FOR MEDICAL EXAMINATION IN PERSONAL INJURY ACTIONS ADOPTED PURSUANT TO F. R. CIV. P. 83 AND SUPPLEMENTING F. R. CIV. P. 35.

A. In any personal injury case in which, prior to the trial thereof, a judge shall be of the opinion that an examination of the injured person and a report thereon by an impartial medical expert or experts would be of material aid to the just determination of the case, he may, after consultation with counsel for the respective parties and after giving counsel a hearing, if such hearing be requested by either counsel, order such examination and report. The examination will be made by a member or members of a panel of examining physicians designated for their particular qualifications by the Medical Society of the State of Pennsylvania after consultation with a committee appointed by the President of the Pennsylvania Bar Association and with the court. Copies of the report of the examining physicians will be made available to all parties.

B. The compensation of the expert or experts shall be fixed by the judge ordering the examination and shall be paid equally by each party to the litigation unless such judge, in his discretion, orders payment to be made otherwise in order to meet special factual situations.

C. If the case proceeds to trial after such examination and report, either party may call the examining physician or physicians to testify or the trial judge may, if he deems it desirable to do so, call the examining physician or physicians as a witness or witnesses for the court, subject to questioning by any party, but without compensation by any litigant."

June 2, 1958.

STATEMENT OF THE CASE.

This is an action under the Federal Employers' Liability Act, Title 45 U. S. C. Sec. 51 et seq., to recover damages for injuries suffered by the petitioner July 30, 1955, while in the employ of The Pennsylvania Railroad Company as a mail handler. Suit on his behalf was instituted July 17, 1956, in the United States District Court for the Eastern District of Pennsylvania, being civil action No. 21051. Under the Federal Tort Claims Act the defendant, The Pennsylvania Railroad Company, brought on the record as third-party defendant the United States of America.

Petitioner claimed that as a result of the negligence of the railroad company, he sustained an avulsion fracture of the spinous process of the first sacral segment, a ruptured intervertebral disc and a traumatic heart attack. In the proceedings hereinafter referred to the fracture is not in dispute; the other two claimed injuries are disputed. By reason of his cardiac involvement, petitioner is totally disabled from his employment. He receives $51 monthly by way of disability pension from the Railroad Retirement Board.

In routine preparation for trial, counsel agreed to the mutual exchange of reports of examining physicians. Pursuant to such agreement petitioner delivered to The Pennsylvania Railroad Company three reports from his two treating physicians, along with copies of his charts of hospitalization. Petitioner also delivered to the railroad company his authorizations to enable the defendant below to examine his original hospital records. Defendant delivered to petitioner twenty-six medical reports and records from its clinic and from eleven doctors, including the reports of four doctors selected by defendant, who examined petitioner at the railroad company's request and with petitioner's consent. One of these examining physicians was an expert in cardiology and one was an expert in orthopedics.

On October 1, 1958, The Pennsylvania Railroad Company, defendant in the civil action, filed in the District Court its "Motion for Impartial Medical Examinations". This motion was filed pursuant to a local rule of the United States District Court for the Eastern District of Pennsylvania adopted June 2, 1958.

The motion was bottomed solely on the ground that petitioner's and defendant's orthopedists had opposite views on the question whether petitioner had suffered a herniated disc and that petitioner's and defendant's cardiologists had opposite views as to whether the accident in question had any connection with petitioner's subsequent heart attack. No other grounds for the grant of the motion were then or thereafter alleged.

After hearing held October 7, 1958, and over the objections of the petitioner (Transcript, pp. 2-4, 7) an order was entered in the said civil action on October 9, 1958, by the Hon. Francis L. Van Dusen and the Hon. C. William Kraft, Jr., which required the petitioner to submit within twenty days to examination by two designated allegedly "impartial" physicians, one each in the fields of orthopedics and cardiology. The named physicians were drawn by the said judges from a list of alleged "impartial" medical experts, which list has never been made public. The court found, and so stated in its order, that the petitioner was unable to afford one-half of the fees of such experts.

Paragraph 7 of the aforesaid order required that the petitioner, prior to distribution to his counsel of the reports, file with the Clerk of the District Court a stipulation agreeing to the payment to the movant defendant of fifty per cent of the said experts' fees out of any recovery obtained by petitioner.

On October 14, 1958, petitioner filed in the United States Court of Appeals for the Third Circuit his petition for the grant of a rule upon the Hon. Francis L. Van Dusen and the Hon. C. William Kraft, Jr. to show cause why peremptory writs of mandamus and prohibition should not issue out of that Court, requiring the aforesaid District Judges to

declare void the local rule of June 2, 1958, and to vacate and declare void the Order of October 9, 1958. Petitioner averred inter alia that the case sub judice in its medical aspects involved no more than simple, disputed factual issues. This averment was not denied.

On October 21, 1958, the said petition for writs of mandamus and prohibition was denied, without hearing and without opinion. This petition followed.

For the sake of completeness, petitioner's counsel for use in this petition sought of the United States District Court for the Eastern District of Pennsylvania, the facts as to the total number of "Motions for Impartial Medical Examination" filed with the said court since adoption of its local rule June 2, 1958, and the number of such motions granted. The Court declined to furnish such information. Petitioner's counsel can state, however, that in their own office, during the current fall trial period, such motions have been filed by opposing counsel in seven cases and have been granted in six cases with one motion pending (Appendix).

REASONS FOR GRANTING THE WRIT.

1. The immediate and unavoidable implications of the issues at bar reach into literally every civil jury litigation in the federal courts where the physical or mental condition of a litigant is in issue. It thus presents a dominating problem, the solution of which is ultimately the responsibility of this Court: the administration of justice throughout our federal courts.

2. The critically important problem involved in this case is whether, notwithstanding the dictates of the Seventh Amendment, United States District Courts may as a standing practice order what can only be intended to be the arbitration of simple, clearly defined issues by allegedly "impartial" experts appointed by the court in jury trials.

3. Rule 35, a pre-trial discovery rule, is one of the most frequently used Rules in our federal District Court. This

Court has never construed the Rule but only its constitutionality. *Sibbach v. Wilson & Co., Inc.*, 312 U. S. 1, 61 S. Ct. 422 (1941). The case at bar presents several vital questions of construction of the limits of the Rule:

(a) Does the Rule authorize the appointment of "impartial" medical experts such as those appointed in this case after full medical discovery has been exhausted under the Rule?

(b) Does Rule 35 authorize the imposition of the costs of medical examinations by such court-appointed "impartial" medical experts on litigants other than the moving party?

(c) Does the Rule authorize the imposition of a portion of the fees on the prevailing party?

(d) Does the Rule authorize the imposition of such costs as a precondition to the disclosure to the party examined of the findings of such "impartial" medical experts?

4. The case at bar presents the important question of whether the appointment of "impartial" medical experts by the court with functions similar to those of a master may only be made under the strict standards imposed by Rule 53 of the Federal Rules of Civil Procedure.

5. The instant case presents the important problem whether the United States District Courts may promulgate local rules purporting to supplement existing federal rules on discovery, where all purposes of that existing rule have already been accomplished and the local rule relates not to discovery but rather to the use of the testimony of "impartial" experts at trial.

6. It involves a serious and important question of the power of the United States District Court to promulgate local rules where the subject to which the local rules relate has already been preempted by existing Federal Rules of Civil Procedure.

ARGUMENT.

Introduction.

Mandamus and prohibition are the proper remedies. Those writs lie to test the question whether the District Court has acted beyond the scope of the Federal Rules, and whether its action constitutes an unlawful deprivation of petitioner's right to trial by jury and a denial of due process of law. *In La Buy v. Howes Leather Company*, 352 U. S. 249, 256, 77 S. Ct. 309, 313 (1957), this Court held mandamus in such case to be the proper remedy and said:

> "As this Court pointed out in Los Angeles Brush Mfg. Corp. v. James, 1927, 272 U. S. 701, 706, 47 S. Ct. 286, 288, 71 L. Ed. 481: '• • • [W]here the subject concerns the enforcement of the • • • [r]ules which by law it is the duty of this court to formulate and put in force,' mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked."

Again in *In re Peterson*, 253 U. S. 300, 40 S. Ct. 543 (1920), an objection to jurisdiction was made based upon the contention that mandamus and prohibition did not lie prior to trial and that therefore those writs were not the appropriate remedy. In that case this Court had before it the appointment of an auditor whose findings would ultimately be placed before a jury. This Court said per Mr. Justice Brandeis (253 U. S. at p. 305, 40 S. Ct. at p. 544):

> "• • • Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him, and his report should

be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in Ex parte Simons, 247 U. S. 231, 239, 38 Sup. Ct. 497 (62 L. Ed. 1094) 'be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake.' The objection to our jurisdiction is unfounded . . ."

The above holdings conclusively demonstrate that mandamus and prohibition are indeed not only available but are the only appropriate remedies here.

I. The District Court's Order and the Local Rule Supporting It Are an Attempt to Exercise Jurisdiction Which That Court Does Not Have. They Violate the Seventh Amendment of the Constitution.

In actions such as this where the mental or physical condition of a party is in controversy, the Federal Rules of Civil Procedure empower the District Court, upon motion for good cause shown, to order a medical examination for such condition.

Unquestionably the purpose of Rule 35 is part of the larger pattern of pre-trial discovery under the Federal Rules, and the scheme of Rule 35 is simply to furnish the parties with a method for mutually disclosing certain medical information. The intent of the Rule was to open an area of pre-trial discovery that did not exist before its promulgation, *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 11 S. Ct. 1000 (1891). Federal Rule of Civil Procedure 37 also expressly discloses that Rule 35, which is treated

within Rule 37, is an integral part of the pre-trial and discovery aspect of the Federal Rules. Rule 37 is entitled: "Refusal to make discovery; consequences." It specifically deals with the failure to comply with an order made under Rule 35 requiring submission to a physical or mental examination [(Rule 37(b)(2))].

Conclusive of this purport of Rule 35 is the fact that the Fifth Division of the Federal Rules of Civil Procedure, in which Rule 35 is found, is entitled "Depositions and Discovery." See also Holtzoff, "A Judge Looks at the Rules After Fifteen Years of Use", 15 F. R. D. 155, 164.

The only aspect of Rule 35 linking the Rule and the actual trial of the cause is its sanctioning provision permitting the court to bar trial testimony by a non-compliant physician. Rule 37 has equivalent barring sanctions against a non-compliant party.

In the case at bar, the remedies afforded by Rule 35 have been completely exhausted and achieved. At the time the defendant Pennsylvania Railroad moved for the grant of the order under the local Rule, it had received all the medical reports in petitioner's possession and had examined petitioner by four doctors of its own choosing. Thus it had medical knowledge that was at least equivalent to that which petitioner had about his own condition.

It is therefore bluntly obvious that although it invoked Rule 35 in an effort to bottom its local rule, the District Court here was not in any legal or factual sense giving relief under Rule 35. That relief had already been totally accomplished in this case. The local rule must therefore look in some direction other than discovery.

The other Federal Rule of Civil Procedure pursuant to which the lower court announced its promulgation of the local rule is Rule 83.

There are no cases arising under Rule 83 whose facts remotely resembly those instantly. No cases have been found in which a federal court attempted to promulgate a local rule of court having the content and effect of the

rule at bar or the manifest consequences of the order sired by that rule.

Rule 83 contains the self-limiting provision that: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

What then are the local rule, and its consequent order, really attempting to do?

The gist of the remedy sought in the motion below is nothing less than, in effect, the arbitration by physicians of an issue as to which other physicians have in good faith[1] disagreed.

In this situation, the only relief conceivably authorized under the Federal Rules of Civil Procedure would have to be sourced in Rule 53. Consequently, if the District Court below had any jurisdiction to compel reference to the "impartial" physicians, it could only be founded in Rule 53.

The beginning and the end of this Petition, and the reason why its grant is urgently needed and justified, is that Rule 53 absolutely fails to invest the District Court with any power to do what it is seeking to do here. Failing any jurisdictional foundation, the order and whatever support it purportedly finds in the local rule are simply judicial commands by a court possessing no power to compel compliance with those commands.

Rule 53(b) provides in part as follows:

> "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated . . ."

The Appendix attached herewith indicates first of all that the new local rule below is swifty working itself out

1. Nowhere have movants below, or the District Court, ever suggested that the physicians here whose opinions are in disagreement are biased, corrupt, partial or professionally incompetent.

into a practice that unambiguously demonstrates that references to "impartial" medical experts are the rule rather than the exception in cases of conflicting medical facts. It appears that wherever there is a disputed issue of medical fact in a personal injury action, parties are increasingly moving the District Court for the appointment of "impartial" medical experts. If nothing else appeared in cases such as this, this pattern of growing frequency would clearly be a direct violation of the exceptional remedy available under Rule 53.

Beyond this, however, the violation is gravely compounded in this case, as in the cases in which the same relief has been sought in an analogous context, by the fact that it is not claimed, nor could it be, that the issues involved as to which reference is requested are complicated. Indeed, that is exactly what the issues are not. Neither the moving parties below nor the District Court ever suggested that they were. Neither the Court nor the moving parties below could make such a suggestion. As a matter of fact, the issues here are simple, and Paragraph 14 of the petition for the writs of mandamus and prohibition in the Court of Appeals averred exactly that.

The only reason that a reference is being sought is not because this is an exceptional case nor because it involves any complexity but solely because qualified doctors in good faith differ in their opinions as to the medical condition of the petitioner, and the court is seeking to have those differences of opinion arbitrated by an "impartial" expert. Indeed, the eighth paragraph of defendant railroad company's motion for the appointment of the "impartial" expressly grounds its application for relief in these words:

> "*In view of the diametrically opposed position taken by plaintiffs' and defendants' doctors,* impartial examinations of plaintiff and impartial reviews of the past medical history would be of material aid to the just determination of the case." (Italics supplied.)

It is nothing more than these differences of opinions that are sought to be used as a basis for the appointment of the "impartial" experts.

The operation of the local rule and the order are thus in direct conflict with Rule 53. But beyond the facts of this case, the local rule violates Rule 53 because it runs afoul of it in Rule 83 terms: the local rule is inconsistent with Rule 53.

Two vital criteria—the only criteria—for determining whether reference will lie are contained in Rule 53(b): (1) references are exceptional; (2) "In actions to be tried by a jury, a reference shall be made only when the issues are complicated . . . ." Neither one of these criteria is embodied either in letter or spirit within the local rule. Instead, a fundamentally different criterion is asserted as the determinant for reference: if the judge is ". . . of the opinion that an examination of the injured person and a report thereon by an impartial medical expert or experts would be of material aid to the just determination of the case . . ." As admirable as this generalized standard may be, it does not save the rule from being in fundamental conflict with Rule 53 nor does it create jurisdiction where none otherwise exists.

If they suffered from no other deficiencies of law, the order and its underlying local rule would thus be fatally defective, unsupported as they are by any jurisdiction and running afoul as they do of Federal Rules of Civil Procedure 53 and 83.

Standing alone these root defects justify the issuance of the Writ here.

But there is a second ground, separate and distinct from that just demonstrated, which would also nullify the order and supporting local rule. These commands of the District Court are damaging assaults on the preservation of the right to trial by jury vouchsafed by the Seventh Amendment of the Constitution of the United States.

To comprehend its unlawfulness and the impact that the order and local rule will necessarily have, we need only measure our case against this Court's reasons (which yield a contrary result to the one sought here) in *In re Peterson*, 253 U. S. 300, 40 S. Ct. 543 (1920).

There, on a petition for writs of mandamus and/or prohibition, petitioner challenged the District Court's appointment of an auditor whose instructions were (1) to segregate a great mass of items on business transactions upon which the parties agreed and to classify those in controversy in order to define the issues, and (2) to express an opinion as to those items in dispute.

Writing for the majority, Mr. Justice Brandeis made a sevenfold analysis of the problem. The last two of these seven subdivisions treated the fee aspects of the problem and are discussed *infra*. We turn now to the other five considerations and, treating them *seriatim*, we respectfully submit that the *ratio decidendi* of *Peterson* compels only one conclusion here: the Writ should issue.

First. Respondent there objected to the jurisdiction of this Court, urging that the auditor should prosecute his duties, trial should be had and plaintiff's exceptions should then be reviewed by the Circuit Court of Appeals. This Court rejected the contention and held that it had jurisdiction to adjudicate the petition. Exactly the same jurisdictional conclusion must be reached here.

Second. Tentatively assuming that if the District Court had power to appoint an auditor, the Court found that the facts in *Peterson* warranted the exercise of that power. In suit was plaintiff's claim for a balance due on an account containing 298 items. The defendant answered asserting another account containing 402 items arising out of 123 separate deliveries of coal on 91 different days during an eleven month period. The coal itself as well as the invoices varied in kind and prices differed for the same kind of coal.

Additional complicating factors are suggested in the *Peterson* opinion which we will not detail here.

Against this background of great complexity and a mass of undefined issues, this Court believed that the auditor's task of identifying, segregating and classifying matters both in agreement and in issue would shorten the trial of the case to a substantial degree.

The factual context present in *Peterson* is utterly missing here. Factual complexity in *Peterson* is absolutely displaced by stark simplicity. The issues in *Peterson* were unknown. The issues here were not only known but were actually identified by the party moving for the reference.

Finally the work of the auditor in *Peterson* would have compressed the time of trial. Here an antithetical result must occur: the time of this trial will dilate instead of contract, for where physicians would conventionally appear as witnesses for litigants on both sides, that will still occur here plus the appearances of two "impartials". It is impossible to understand how more witnesses than those conventionally used will shorten a trial over issues that are admittedly sharp and simple.

THIRD. In *Peterson* this Court traced the origin of the auditor and acknowledged at 253 U. S. 309, 40 S. Ct. 546: "No act of Congress has specifically authorized the adoption of the practice in the federal courts." The Court then framed the issues it had to resolve as whether the appointment of auditors was consistent with the constitutional right of trial by jury and also whether the District Court, as a trial court, had the inherent power to make such an appointment.

Of course, here the court appointees were not auditors but physicians. If there were no other distinction between this case and *Peterson* that would remain a profound one, for whatever limits may be put upon the field of inquiry of the auditor, the stuff of that inquiry is accounts. There one

and one is always two. Accounts are not medicine, and it is in the field of medicine with all of its unknowns and unfolding yet tentative experimental knowledge that the "impartial" experts here will have their trial impact.[2]

FOURTH. This Court said that the Seventh Amendment is not a command ". . . that old forms of practice and procedure be retained" (253 U. S. 309, 40 S. Ct. 546). Having said this, it then marked the rigorous limits of the Seventh Amendment within which new methods must operate to be valid:

> "The limitation imposed by the amendment is merely that enjoyment of the right to trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." (253 U. S. 310, 40 S. Ct. 546)

The Court then found that the appointment of the auditor did not breach those limits. He did not obstruct because his function of defining and simplifying the issues

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2. In an address at the Twenty-Seventh Judicial Conference of the Fourth Circuit on June 8, 1957, Paul Berman, Esquire, of the Maryland Bar spoke as follows:

> "The essential flaw in the position of the proponents of the plan for impartial medical testimony is the fact that medicine is not an exact science, and medical opinions cannot be given with absolute mathematical certainty.
>
> "In the course of a symposium on 'The Doctor in Court—Expert Medical Testimony' conducted by the Medical and Chirurgical Faculty of Maryland, 13 Maryland Law Rev., p. 304 (1953), Dr. George O. Eaton, an eminent surgeon of the City of Baltimore, in discussing the 'Viewpoint of the Traumatic Surgeon' said:
>
> > 'Given exactly the same facts, even conscientious experts can and will disagree with regard to their significance and potentialities, so that the mere disagreement between experts does not imply dishonesty or incompetence on the part of one or both of them.'"

The Daily Record, Baltimore, Maryland, p. 5 (June 22, 1957).

is really the equivalent of that of pleading, and he did not unduly interfere with the ultimate determination of the issues because no incident of the trial is removed by the introduction of the auditor whose report is admissible in strong part because he is an officer of the court, subject to its supervision and his report may be used only if acceptable to the court.

Here it is simply inconceivable to equate the function of "impartial expert" with that of pleading. The simple, clear-cut issues were absolutely fixed before the "impartials" were appointed. The very core of this matter lies exactly at this point: *the "impartial experts" were appointed here not to define the issues but just because the issues were defined.*

Saying this with all the conviction at our command, we are also saying with the same conviction that the only purpose of which reason will admit for the appointment of the "impartial" is that the local rule and order intend exactly this: that the ultimate determination of these issues of fact by the jury shall be deeply and persuasively affected by the testimony of the "impartial". If in cases like this there is no claim of complexity, an actual *insistence* that the issues are sharply drawn, and no suggestion that physicians who have drawn these sharp issues are incompetent, corrupt or prejudiced, then what possible reason could a court have for imposing a rule and order like those at bar except to clothe a witness with something of the unique dignity and authority of the court's impartiality, so that his testimony will be accepted to the rejection or exclusion of those men—even his professional and moral peers or superiors—who disagree with him. This has the blunt impact of turning the "impartial" into a referee. This is nothing less than a great breach in the wall this Court built in *Peterson.*

FIFTH. Having found that Congress legislated no authority to the District Courts to make the order of appoint-

ment, the Court then inquired whether it had ". . . inherent power to supply itself with *this* instrument for the administration of justice when deemed by it essential." (253 U. S. 312, 40 S. Ct. 547, Italics supplied.)

The Court then cited a number of examples in *equity* cases, which aside from the fact that they were in equity, were otherwise distinguishable because in none of them was there anything factually akin to what is being attempted here. Then the Court concluded that the District Court was seeking the kind of aid that the chancellors sought in their equity cases.

But in saying that, this Court then swiftly and tightly hemmed in the situations at law where reference would lie, and those situations must meet essentially the identical and indispensable conditions that are now laid down in Federal Rule of Civil Procedure 53: they must be exceptional and they must be complicated. From the simple, sharply delineated facts that are now before this Court, it can see conclusively that this is absolutely not such a case.

Thus even if we concede *arguendo* that there is no Seventh Amendment disability here, the only law which could justify the extraordinary rule and order below is the *Peterson* rule controlling whether this is one of those exceptional areas where the federal trial court has the inherent power to do what is sought to be done here. The indispensable preconditions laid down by that rule are totally absent. Thus there is no inherent power to invest jurisdiction on the District Court below. Its order and supporting rule must be unlawful.

II. The Local Rule and Order Are in Violation of the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

Promulgated against this backdrop of lack of power, and in complete disregard of or with a failure to recognize the complicated and exceptional situation necessary under

Rule 53 for the appointment of a master, the local rule provides for an unconstitutional division between the litigants of the fees to be paid to the doctor. The rule requires that each litigant shall pay one-half of the compensation to the doctors without that litigant's agreement.

It is petitioner's position that this portion of the rule is undoubtedly unconstitutional in that it deprives him of property—the fees he must pay—without due process of law in violation of the Fifth Amendment of the Constitution of the United States. By judicial fiat the rule deprives petitioner, and indeed, any litigant, of one-half of an undetermined amount without any judicial determination that he owes such amount. It makes a litigant pay a doctor an undetermined amount without a hearing, without the production of evidence and without any opportunity to the litigant to prove that he should not pay for an examination he never requested, and indeed, opposed. Under the rule as expressed by the order in this case, litigants are simply not given an opportunity to be prepared fully to try an uncomplicated issue of their case without agreeing to pay this indeterminate amount.

As a matter of fact, the rule is actually a pre-trial imposition of costs regardless of the results of the trial. If it is construed as a rule of costs, it is unconstitutional in that it is beyond the power of the court in two respects.

First: It imposes costs which a court cannot under its powers tax.

Second: It divides such costs in a manner repugnant to the lawful division of costs under the existing law.

In truth, prior to trial the rule imposes on the litigant one-half the costs of an expert examination. These costs could not even be taxed against the unsuccessful party after trial. The amount spent for the testimony of an expert witness is not taxable as costs. *Firtag v. Gendleman*, 152 F. Supp. 226 (U. S. D. C., D. C.) (1957); *Kenny v. The United States of America*, 118 F. Supp. 907 (U. S. D. C.,

N. J.) (1954). See *Hansen v. Bradley* 114 F. Supp. 382 (U. S. D. C., Md.) (1953).

It has been held that even though the testimony is such that the court is enlightened, the fee for such testimony is not taxable as costs under any equitable doctrine. In *Specialty Equipment & Machinery Corp. v. Zell Motor Car Company*, 193 F. 2d 515, 521 (C. A. 4, 1952), the Court said:

> "* * * The fact that the court is enlightened by certain evidence is not such an exceptional circumstance as to justify the taxation in the costs of the expense of procuring that evidence . . ."

Furthermore, it imposes these costs against even the prospective prevailing party.[9] The imposition of costs on the prevailing party is without authority in law. This Court said (per Mr. Justice Brandeis) *In re Peterson*, 253 U. S. 300, 317, 40 S. Ct. 543, 549 (1919):

> "* * * The further question is whether the District Court had power to make the expense of the auditor taxable in whole or in part against the prevailing party, if the trial judge should so determine. The advantages of such a flexible rule are obvious. But general principles governing the taxation of costs in actions at law followed by the federal courts since their organization, preclude its adoption.
>
> While in equity proceedings the allowance and imposition of costs is, unless controlled by statute or rule of court, a matter of discretion, it has been uniformly held that in actions at law the prevailing party is entitled to costs as of right (compare United States v. Schurtz, 102 U. S. 378, 407, 26 L. Ed. 167, 219), except in those few cases where by express statutory provision or by established principles costs are denied . . ."

See also *Chemical Bank and Trust Co. v. Prudence-Bonds Corp.*, 207 F. 2d 67, 77 (C. A. 2, 1953); *Duke Power*

Co. v. Greenwood County, 91 F. 2d 665, 677-678 (C. A. 4, 1937).

It has thus been demonstrated that one-half of the cost of this medical examination cannot be indiscriminately taxed against the petitioner under the existing law. If this be so, then the rule providing for the payment of one-half of the fee by a litigant who never requested the appointment and without a hearing and even though he prevails, is without authority in law and deprives petitioner of property without due process of law.

III. The Order of October 9, 1958, Violates Both Rule 35 and the Local Rule of June 2, 1958.

Assuming pro arguendo that the local rule is valid and that the District Court has the power to assess one-half of the medical examiners' fees against each party, or in the alternative to require the plaintiff to stipulate to pay one-half of such fees out of any recovery, we nevertheless submit that paragraph 7 of the order of October 9, 1958, contravenes both Rule 35 and the local rule and is therefore void.

Rule 83 of the Federal Rules of Civil Procedure provides that:

> "Each district court . . . may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Rule 35 of the Federal Rules of Civil Procedure, relating to medical examinations, provides in part:

> "b. Report of Findings.
>
> (1) If requested by the person examined, the party causing the examination to be made shall

deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions."

The local Rule of June 2, 1958, provides in part:

"Copies of the report of the examining physicians will be made available to all parties."

Paragraph 7 of the Order of October 9, 1958, provides:

"The plaintiff shall, prior to the distribution to counsel of copies of the aforesaid reports, file with the Clerk of this court a written stipulation that fifty per cent of the aforesaid doctors' fees shall be paid to the movant defendant from any amount the plaintiff recovers in this action."

To the extent that the order of October 9, 1958, requires the plaintiff to file a stipulation to pay one-half the fees as a condition precedent to access to the medical examiners' reports, it clearly violates Rule 35, which entitles him to copies of reports merely on request, and additionally violates even the local rule under which it purports to be entered, which itself provides that such reports shall be made available to all parties, without the imposition of any conditions or restrictions whatsoever.

The purport of the order is clear. If plaintiff declines to yield to the compulsion of filing in advance an agreement to pay one-half the physicians' fees, he is deprived of access to the reports. His preparation for trial is thus seriously handicapped. Indeed, his ability properly to prepare for cross-examination of the impartial expert is effectively destroyed.

It is this "no pay, no see" requirement which is completely proscribed by Rule 35 read in the light of Rule 83. The unconditioned availability of reports, which is supposedly insured by Rule 35, serves an obvious purpose within the discovery framework of the Federal Rules: to

fairly and properly place the parties in equal status as to access to medical information. But what this order does is precisely the opposite. It places a premium on the one hand on ability to pay and lays a penalty on the other upon an impoverished plaintiff or one who declines to execute a stipulation or agreement under compulsion. It fosters inequality rather than equality. Under the guise of reform it delivers to the defendant railroad a significant advantage and simultaneously places the plaintiff under a serious handicap.

It takes away an unqualified right given the plaintiff by Rule 35 and fetters it with a condition nowhere authorized by the Rules. It then compounds this inequity by requiring the plaintiff who did not ask for the examinations to pay one-half the fees even if he wins.

It has been the unvarying practice under Rule 35 that the moving party pay the fees of the examining physicians.[3] Under that practice the choice whether to incur any such expense was exclusively and properly the defendant's. Under the order here involved the defendant, by filing its motion (and this without any showing whatsoever that it lacks medical information as to the plaintiff's condition) simply relieves its own exchequer of the payment of one-half the fees it would ordinarily bear, comforted by the court's ordering the plaintiff to pay the balance, and this without any agreement on the plaintiff's part to any such payment and without any adjudication of his liability therefor.

But the order in the instant case goes even beyond that. What it says is that if you are impoverished, you cannot have access to the findings of the impartial examiner unless you agree in advance to pay one-half his fees, and if you decline so to agree we are not concerned that thereby we have taken away from you a right granted by Rule 35;

3. Careful research has not disclosed a single case imposing on the plaintiff any portion of the fees of a physical or mental examination conducted at defendant's request.

we are not concerned that the result condones partiality and that thereby we convert adversary proceedings, with full disclosure, into ex parte proceedings with non-disclosure.

We submit that under Rule 83 this order violates not only the express terms of Rule 35 but offends and destroys the entire wholesome and salutary purpose of the modern Federal Rules of Civil Procedure, i.e., to effect as nearly and as fairly as possible an equality of position with respect to access to proof. This order places the stamp of judicial approval on inequality of access, an inequality itself judicially created. Even in New York, where the impartial medical plan has received its greatest impetus, no conditions precedent are imposed upon counsel's access to the examiners' reports ["Impartial Medical Testimony", Hon. David W. Peck, 22 F. R. D. 21, 23 (1958)]; Para. 2, Rule, Supreme Court of New York County, id. p. 24.

Rule 53, authorizing references to a "master", "referee" or "examiner", expressly provides that their report cannot be retained as security for payment:

> "a. Appointment and Compensation. . . . The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

Here it is the court not the examiner which insists on retaining the report, undisclosed to the plaintiff, as security unless and until plaintiff agrees to pay fifty per cent of the fee, ultimate payment to be made only in the event plaintiff prevails. How can it be said that such procedure "would be of material aid to the just determination of the case" (local rule of June 2, 1958) when the court below bars the injured plaintiff from free access to the reports unless he agrees in advance to give up an undisclosed amount of his recovery!

It is no answer that precedent for this requirement may be found under Rule 53, under which the master's compensation may be charged upon the parties, and that therefore the instant order is proper. This case is not within Rule 53. Furthermore, granting that the Rules of Civil Procedure, promulgated by the Supreme Court pursuant to Congressional authority, have the force of statute [*Sibbach v. Wilson & Co., Inc.*, 312 U. S. 1, 61 S. Ct. 422 (1941)], there is no such "legislation" by way of Rule 35 imposing any part of the examiners' fees on the plaintiff. If the present order is inconsistent with Rule 35, as we submit it clearly to be, and is in express terms prohibited by Rule 53, then the order is self-born, derives its authority from no lawful source and amounts to no more than an attempt at judicial legislation. It is elemental that the District Court has no such power. Cf. *Washington-Southern Nav. Co. v. Baltimore & P. S. Co.*, 263 U. S. 629, 635, 44 S. Ct. 220, 222 (1924).

Rule 35 grants plaintiff an unqualified, unrestricted and unconditional right to reports of medical examinations ordered on motion. By its order, the District Court emasculates that right. We submit that it is without power to perform such radical surgery.

CONCLUSION.

In the setting of an admittedly uncomplicated case where simple issues had been sharply drawn, the District Court here invoked its new local rule and issued an order which was nothing more than a reference to two court-designated "impartial" medical experts to, in effect, arbitrate as "impartial" trial witnesses those simple issues drawn by litigants' physicians as to whom neither the District Court nor the movants alleged or found incompetence or partiality. The basis for the imposition of the rule and order was that reference was to be had solely because there were exactly identified, simple issues. As an integral part of the reference the Court imposed on this protesting

petitioner the requirement that he stipulate to pay one-half the fees of these "impartial" arbiters out of any recovery he might achieve in the litigation as a condition precedent to his being informed of the "impartial" arbiters' findings.

There is absolutely no authority for this remarkable rule and order in the Federal Rules of Civil Procedure, notwithstanding the District Court's invocation of Rules 35 and 83. It falls closest to the remedy of Rule 53, but even there the case's admitted simplicity and the growing frequency with which this procedure is being applied in the District are in direct conflict with those essential preconditions which must be satisfied before Rule 53 may operate: the case must be complicated and reference must be exceptional. Those same preconditions, absent here, must exist before the doctrine of inherent power can be invoked to invest jurisdiction.

Fatally defective in jurisdictional support, the rule and order are also in direct violation of the Fifth and Seventh Amendments of the United States Constitution.

The issues in the case at bar raise questions of first impression. They are questions of commanding importance because they reach deeply into a vital area of the judicial administration of civil jury trials in every federal court in the nation.

So far as is known, the local rule and its consequent order represent the first instance in any federal court where this extraordinary procedure has been attempted. The potential that it will swiftly be installed in other United States District Courts throughout the nation is real and great. "... [E]ven 'a little cloud may bring a flood's downpour' if we approve the practice here indulged, particularly in the face of presently congested dockets, increased filings, and more extended trials." (per Mr. Justice Clark in *LaBuy v. Howes Leather Company*, 352 U.S. 249, 258, 77 S. Ct. 309, 315 [1957]). Justifiably concerned as it is with the massive modern problem of court congestion and delayed justice in the federal courts, this Court is the eminently

appropriate forum in which this supposed reform should be scrutinized.

Possible reform must first be lawful reform, and if even the most admirably intentioned judicial innovations destroy fundamental rights, and have no source in any existing jurisdiction, they cannot stand.

If the local rule and order at bar sought a method for relieving congestion by supposedly foreshortening trial time, they will accomplish a contrary result. On these facts more rather than fewer witnesses will appear at trial.

But even if this were not the practical result of the rule and order, the diminution of trial time is not the coin which will purchase shrunken constitutional guarantees, nor local court rules and resulting orders that arise where no jurisdiction exists to support them. That is the fundamental wrong in this case and in the untold number of cases which will receive the same unlawful treatment unless the wrong is barred now. The Writ should issue.

Respectfully submitted,

ELWOOD S. LEVY,
CHARLES A. LORD,
SEYMOUR I. TOLL,
Counsel for Petitioner.

RICHTER, LORD & LEVY,
121 South Broad Street,
Philadelphia, Pennsylvania,
Of Counsel.

Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

ARNOLD HANKINSON

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant and Third-Party Plaintiff,

v.

UNITED STATES OF AMERICA,
Third-Party Defendant.

Civil Action
No. 21,051.

Filed October 9, 1958.

MEMORANDUM AND ORDER SUR DEFENDANT'S MOTION FOR IMPARTIAL MEDICAL EXAMINATION.

MEMORANDUM.

Notice of the hearing on defendant's motion was given to the offices of counsel for plaintiff and for defendant on Saturday morning, October 4, 1958. Upon hearing held October 7, 1958, counsel for the third-party defendant orally joined in the defendant's motion. The plaintiff objected to the grant of the motion and assigned as reasons that (1) the local Rule invoked was an invalid exercise of the rule-making power of this court; (2) the grant of the motion might impose costs and/or fees upon the plaintiff and so be

a denial of due process; (3) a quasi-judicial status would be attributed by the jury to impartial medical experts appointed by the court, if such experts were called and testified; (4) there is no such thing as an impartial medical witness; (5) defendant's motion was filed too late.

Plaintiff's supplemental letter dated October 7, 1958, and received October 8, 1958, has been placed in the Clerk's file.

ORDER SUR DEFENDANT'S MOTION FOR IMPARTIAL MEDICAL EXAMINATION.

AND NOW, October 9, 1958, after hearing upon defendant's motion under F. R. Civ. P. 35 and local Rule dated 6/2/58 for physical examination of plaintiff by impartial medical experts, the court finds that (1) such examinations and reports thereon would be of material aid to the just determination of the case, and (2) the plaintiff cannot presently afford to pay one-half of the fee of such impartial medical experts, and it is ORDERED that:

1. Dr. Z. B. Friedenberg and Dr. C. F. Kay are appointed as impartial medical experts in this case.

2. The plaintiff shall, within twenty days, submit himself to Dr. Z. B. Friedenberg for examination with respect to his alleged "ruptured intervertebral disc."

3. The plaintiff shall, within twenty days, submit himself to Dr. C. F. Kay for examination with respect to his alleged "traumatic heart attack" and the alleged connection between plaintiff's alleged accident on July 30, 1955, and his present heart condition.

4. Plaintiff's, defendant's and third-party defendant's counsel shall make or cause to be made available to Dr. Friedenberg all prior medical reports and x-rays relating to plaintiff's alleged disc condition and shall make or cause to be made available to Dr. Kay all prior medical reports, cardiograms, x-rays and the like concerning plaintiff's alleged heart condition.

5. Each doctor shall, within forty-five days, file copies of his report with the Clerk of this court.

6. The Pennsylvania Railroad Company, as moving party, shall, prior to the distribution to counsel of the copies of the aforesaid reports, pay into the registry of this court such doctors' fees as shall be fixed by the court.

7. The plaintiff shall, prior to the distribution to counsel of copies of the aforesaid reports, file with the Clerk of this court a written stipulation that fifty per cent. of the aforesaid doctors' fees shall be paid to the movant defendant from any amount the plaintiff recovers in this action.

8. This case now appearing on the trial list for the three-week civil trial term beginning October 13, neither of the aforesaid doctors shall be called as witnesses at the trial pursuant to paragraph C of the aforesaid local Rule of Court, if the case is tried at the trial terms beginning October 13 and ending October 31, 1958, in view of the lateness of defendant's motion filed October 1, 1958.

9. Plaintiff's objections, insofar as they are applicable to this order, are overruled.

/s/ Francis L. Van Dusen, *J.*
C. William Kraft, Jr., *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,740

ARNOLD HANKINSON,
Petitioner.

v.

HONORABLE FRANCIS L. VAN DUSEN

AND

HONORABLE C. WILLIAM KRAFT, JR.,
Respondents.

Present: MARIS, MCLAUGHLIN and HASTIE, *Circuit Judges.*

Upon consideration of the petition for writs of mandamus and prohibition in the above-entitled matter.

It is ORDERED that the petition be, and it is hereby denied.

By THE COURT,

ALBERT B. MARIS,
Circuit Judge.

October 21, 1958.

Received & Filed
Oct. 21, 1958.
Ida O. Creskoff,
Clerk.

AFFIDAVIT.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

ELWOOD S. LEVY, being duly sworn according to law, deposes and says that he is of counsel for the petitioner, that for informational use in the preparation of the within Petition for writ of certiorari in the matter of Arnold Hankinson, Petitioner, v. Hon. Francis L. Van Dusen and Hon. C. William Kraft, Jr., he requested of the District Court for the Eastern District of Pennsylvania that that Court make available to him the information as to the total number of "Motions for Impartial Medical Examinations" filed pursuant to its local rule of June 2, 1958, up to the present time and of the number of such motions granted, but was advised by the Clerk of the said Court who stated that he was acting by direction of the Court that the Court declined to furnish such information. Deponent further avers that in cases presently pending and in which the plaintiffs are represented by the firm of Richter, Lord & Levy, of which firm deponent is a member, "Motions for Impartial Medical Examinations" pursuant to the aforesaid local rule of June 2, 1958, were filed by opposing counsel in the cases now pending in the United States District Court for the Eastern District of Pe. ylvania as set forth in the below list and that said motions were disposed of as indicated:

Caption	Civil Action No.	Disposition	Date of order
Hankinson v. P. R. R.	21051	Granted	October 9, 1958
Ferrer v. P. R. R.	22392	Granted	October 10, 1958
Summers v. P. R. R.	23205	Granted	January 8, 1959
Glunt v. P. R. R.	22390	Granted	November 7, 1958
Wolfe v. P. R. R.	22393	Granted	December 15, 1958
Dunning v. P. R. R.	22383	Granted	December 15, 1958
Laudenslager v. P. R. R.	23065	Pending	

/s/ Elwood S. Levy,
Elwood S. Levy.

Sworn to and subscribed before me this 14th day of January, 1959.

Nancy Shaw,
(Seal) Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires February 2, 1961.